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No. 96-

In The

Supreme Court of the United States

October Term, 1995

HENRY WOLF,

Petitioner,

v.

BUSS AMERICA, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When an employer in a discrimination suit proffers numerous reasons for an adverse employment decision but cannot point to a single determining reason for the adverse decision, and the majority of the proffered reasons are shown to be untrue, can the court take the case away from the finder of fact and preclude the finding that all of the proffered reasons are pretextual?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1994) 7

Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324 (7th Cir. 1995) 7

Louis v. Bd. of Ed. of City of New York, 705 F.Supp. 751 (E.D.N.Y. 1989) 8

Odima v. Westin Tucson Hotel Co., 991 F.2d 595 (9th Cir. 1993) 8

Roebuck v. Drexel University, 852 F.2d 715 (3rd Cir. 1988) 7

Russell v. Acme-Evans Co., 51 F.3d 64 (7th Cir. 1995) 7

Sims v. Cleland, 813 F.2d 790 (6th Cir. 1987) 8

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 6

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 247 (1981) 8

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* 2

28 U.S.C. §1254 1

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Henry Wolf respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 16, 1996.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-28) is reported at 77 F.3d 914. The decision of the District Court (App. 29-43) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254; the judgment of the Court of Appeals (App. 1) was entered on February 16, 1996; petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 17, 1996. (App. 44-45).

STATUTORY PROVISIONS INVOLVED

This case involves §623(a)(1) of the Age Discrimination in Employment Act, which provides in part:

> It shall be unlawful for an employer –
>
> (1) . . . to discharge any individual . . . because of such individual's age.

29 U.S.C. §623(a)(1).

STATEMENT

In 1994, petitioner filed a lawsuit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, alleging that respondent terminated him from his employment on account of his age.

In December 1991, when petitioner was 53 years old, respondent terminated him and retained a younger, 34-year-old, employee. (App. 2) Petitioner was employed by the parent company of respondent as an engineer for 28 years prior to transferring and commencing work for respondent in 1989. (App. 2)

By all accounts, petitioner performed his job admirably and was promoted first to service manager and later to chief service engineer. Petitioner's duties included overseeing the installation and start-up of production plants all over the world and rendering consulting services. (App. 2) In April 1991, just prior to his termination, petitioner received a bonus "for exceptional contributions to the company."

Just months after receiving the bonus, petitioner was terminated. Respondent asserted that a financial downturn caused it to reduce its staff of service engineers from three to two. (App. 2) Respondent terminated petitioner and retained a 34-year-old service engineer whom

petitioner himself had trained. (App. 26) Petitioner was the company's most highly skilled engineer. (App. 26)

Petitioner filed this action, alleging that respondent violated the ADEA by discharging him and retaining the 34-year-old service engineer.

Summary Judgment Ruling

Respondent filed a summary judgment motion denying petitioner's allegations of discriminatory intent and proffered a combination of six reasons for firing petitioner instead of the younger service engineer. These reasons, all offered through the same witness, are as follows: (1) petitioner did not get a home telephone installed soon enough; (2) petitioner complained to the parent company about the way things were done at respondent's office; (3) petitioner was excessively talkative; (4) petitioner did not file service reports on time; (5) petitioner was arrogant towards customers; and (6) petitioner did not call in to the office often enough. (App. 6) Respondent did not claim that petitioner was an inferior performer or that petitioner's discharge could have been justified by anything other than the totality of all six of the above proffered reasons. Rather, respondent asserted that financial exigencies required it to choose petitioner over the 34-year-old for lay-off and that the totality of the above six reasons, and not age, was the motivating factor justifying his discharge.

Petitioner filed a response disputing each of respondent's proffered reasons. The District Court, however, granted respondent's summary judgment motion. (App. 43)

Ruling on Appeal

On appeal, the Seventh Circuit recognized that petitioner was "competent and diligent". (App. 16) The Court also concluded that petitioner had presented facts rebutting four of respondent's six proffered reasons. Specifically, the Seventh Circuit stated that reasons nos. 1, 3, 5, and 6 set forth above lacked credibility. (App. 11-15) Moreover, the two remaining reasons, standing alone, were insufficient to justify petitioner's dismissal. The Seventh Circuit noted that the above six reasons were only "minor flaws" which, under normal circumstances, could not have justified discharge. (App. 16)

However, the panel affirmed summary judgment. The majority held that petitioner "must raise an issue of fact regarding each of the reasons proffered for his dismissal or suffer the affirmance of the district court's grant of summary judgment." (App. 7) Thus, despite its finding that four of the proffered reasons lacked credibility, the Seventh Circuit held that since two of the six reasons remained unrebutted, petitioner had failed to carry his burden of raising a genuine issue as to pretext. (App. 15) The Court believed that the two unrebutted reasons were enough to justify discharge in light of an economic slowdown. (App. 16)

In dissent, Judge Rovner stated that a finder of fact should be permitted to infer from the falsity of the four rebutted reasons that the remaining two reasons are also false. (App. 22-23) Observing that all six proffered reasons were offered through the same witness, Judge Rovner concluded that a jury could rationally reject the

witness' testimony *in toto* upon finding that more than half of it was fabricated. (App. 23)

Judge Rovner concluded that the case presents "a very important question in the development of this Circuit's discrimination law," *viz*, what is "the standard of proof to which we will hold discrimination plaintiffs . . . when their employers, on summary judgment, assert that a myriad of non-discriminatory reasons contributed to a single adverse employment action." (App. 27) The dissent recognized that "the ultimate question in cases such as this one . . . [is] whether it would be permissible for the finder of fact to infer from the falsity of the rebutted reasons that the remaining reasons also are pretextual," citing the ancient legal maxim *falsus in uno, falsus in omnibus*. (App. 21-22)

Judge Rovner also found conflict between the majority decision and Third, Sixth and Ninth Circuit precedent holding that an inference of discrimination is permissible when some of the reasons proffered by the employer are untruthful. (App. 21-22)

On consideration of petitioner's petition for rehearing and suggestion for rehearing *en banc*, four judges voted to grant a rehearing *en banc*. (App. 45)

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because: (1) the question raised by this case was left unresolved by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); (2) this is a recurring question in the Circuit Courts; and (3) the Circuit Courts have provided conflicting answers to the question presented.

In this Court's last decision on the standard of proof applicable to discrimination plaintiffs, the Court addressed a related but distinct question in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). This Court held that while the trier of fact's rejection of the employer's asserted reasons for its actions does not *mandate* a finding of pretext, the trier of fact *can infer* pretext from the falsity of the proffered reasons. Here, the question is similar, but remains unanswered by this Court: whether the trier of fact should be allowed to infer pretext from the falsity of one or more, in this case four out of six, of the proffered reasons.

Thus, the question raised is important to the Court's development of discrimination law.

In addition, the Court's resolution of this issue will resolve a conflict among the Circuits. Seventh Circuit law is in conflict with cases in the Third, Sixth and Ninth Circuits.

In this case, as in earlier ones, the Seventh Circuit has held that when an employer proffers several non-discriminatory reasons for an adverse employment action, the fact that some of the reasons are called into question does not defeat summary judgment if at least one reason

stands. (App. 7); *Russel v. Acme-Evans Co.*, 51 F.3d 64, 69 (7th Cir. 1995); *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1337 (7th Cir. 1995).

In contrast to the Seventh Circuit, the Third Circuit has held that upon finding that one alternative and independent proffered reason is false, the jury may infer that all articulated reasons are pretexts for discrimination. *Roebuck v. Drexel University*, 852 F.2d 715, 734 (3rd Cir. 1988). On this basis, the Third Circuit reversed a judgment n.o.v. for the employer. *Id.* In a later case, the Third Circuit explained:

> If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder. That is because the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those rationales in particular is available.

Fuentes v. Perskie, 32 F.3d 759, 764-765 (3rd Cir. 1994). The Third Circuit has thus ruled that a factfinder may infer pretext when one of the proffered non-discriminatory reasons asserted by the employer is false. This holding clearly conflicts with Seventh Circuit decisions in *Wolf*, *Russel*, and *Gadsby*.

Consistent with the Third Circuit, the Sixth Circuit and the District Court for the Eastern District of New York have rejected the argument that the falsity of one or

more proffered reasons mandates a finding that all articulated reasons are pretextual, but have suggested, *sub silentio*, that an inference of pretext is permissible. *Sims v. Cleland*, 813 F.2d 790, 793 (6th Cir. 1987); *Louis v. Bd. of Ed. of City of New York*, 705 F.Supp. 751, 760 (E.D.N.Y. 1989); *See also Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602-603 (9th Cir. 1993) (Fernandez, J., concurring) ("As I see it, we do not mean to say that the falsity of one reason cannot affect the court's [as fact finder] perception of the truth of another one. . . . If based on the evidence, including the comparison of qualifications, the falsity of one reason, and the weakness of the other, the district court is led to a determination that the other reason is also false, the district court need only say so").

The Seventh Circuit, by not allowing a factfinder to infer the falsity of all proffered reasons where the majority of reasons specifically have been found to be unworthy of belief, robs the factfinder of its function of assessing credibility and deprives the plaintiff of a "full and fair opportunity" to demonstrate pretext. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 247, 258 (1981).

Moreover, if an inference of discrimination is not permitted, employers will be encouraged to toss as many reasons into the pot as possible for a single adverse employment decision in the hope that the employee may not be specifically able to refute one of them.

CONCLUSION

The petition for writ of certiorari should be granted.

July, 1996

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-1790

HENRY WOLF,

Plaintiff-Appellant,

v.

BUSS AMERICA, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 902-**Suzanne B. Conlon, *Judge.***

ARGUED SEPTEMBER 27, 1995 – DECIDED FEBRUARY 16, 1996

Before WOOD, JR., ROVNER, and EVANS, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* Alleging that his dismissal constituted unlawful age discrimination, Henry Wolf filed suit against his former employer, Buss (America) Inc. ("Buss America") pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* The district court granted Buss America's motion for summary judgment after it concluded that Wolf had failed to produce sufficient evidence demonstrating that Buss America's proffered reasons for his termination were pretextual. Upon review, we affirm the result achieved in the district court.

I. BACKGROUND

Wolf, a Swiss national, was born on November 27, 1938. He began working as an engineer for Buss AG, a Swiss company, in 1961. Buss AG manufactures and sells equipment used in the plastics industry. By all accounts, Wolf performed his job admirably and was promoted first to service manager and later to chief service engineer. Wolf's duties included overseeing the installation and start-up of production plants around the globe. He also rendered various consulting services to Buss AG's customers.

In light of Wolf's expertise and experience, the appellee – Buss AG's U.S. subsidiary – asked Wolf to transfer to the United States. Wolf initially declined, but negotiations were eventually entered into and Wolf subsequently began working for Buss America as a service engineer, at the age of 50, in September 1989. Then, in December 1991, when he was 53 years old, Wolf's employment with Buss America was terminated. Buss America asserted that a financial downturn compelled it to reduce its staff of service engineers from three to two. One of the remaining service engineers, George Bracikowski, was 34 years of age at the time of Wolf's termination. The third service engineer, Klaus Erlewein, was 51 years old at the time of Wolf's dismissal.

Wolf subsequently filed suit under the ADEA. While Wolf concedes that the financial downturn presented a legitimate reason to fire *someone*, he contends that Buss America's decision to fire him, and not Bracikowski, constituted an act of unlawful age discrimination. Buss

America responded by filing a motion for summary judgment, in which it denied Wolf's allegations of discriminatory intent and proffered several nondiscriminatory reasons for Wolf's termination. Wolf filed a response, disputing Buss America's stated reasons. The district court granted Buss America's motion for summary judgment after it concluded that Wolf had failed to fully and adequately address the reasons proffered for his dismissal. This appeal followed.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment by considering all factual inferences in the light most favorable to the nonmoving party (herein Wolf) and determining *de novo* whether there exists any genuine issue of material fact requiring submission of the case to the finder of fact or whether judgment as a matter of law was appropriate. Fed. R. Civ. P. 56(c); *Colburn v. Trustees of Indiana Univ.*, 973 F.2d 581, 585 (7th Cir. 1992). We note further that "[t]his standard is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues." *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993) (citations omitted).

III. DISCUSSION

In order to show a violation of the ADEA, Wolf must demonstrate that his age was "a determining factor" in Buss America's decision to terminate his employment. *Smith v. Great Am. Restaurants, Inc.*, 969 F.2d 430, 434 (7th Cir. 1992) (citations omitted). Wolf need not demonstrate that age was the sole reason for his discharge; rather, he

need only prove that but for Buss America's motive to discriminate against him on the basis of his age, he would not have been fired. *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984) (citation omitted).

There are two manners of proof available to an employee in this regard. First, the employee may allege that direct evidence proves that age was a determining factor in the employer's decision to terminate him. *Id.* (citations omitted). Alternatively, the employee may proceed under the indirect, burden-shifting method of proof first articulated for use in Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later adapted for use in age discrimination cases. Since Wolf has not introduced any direct evidence which might indicate that Buss America discriminated against him on the basis of age, Wolf's suit must rely on the indirect, burden-shifting method.

At the first stage of this method, the burden rests upon the employee to establish the four elements of a prima facie case of age discrimination. In a reduction in force case, such as this one, the employee must show that: (1) he was in the protected class (persons between the age of 40 and 70); (2) he was doing his job well enough to meet his employer's legitimate expectations; (3) in spite of his performance, he was discharged or demoted; and (4) the employer treated other persons, not in the protected class, more favorably. *Oxman v. WLS-TV*, 846 F.2d 448, 455 (7th Cir. 1988) (citations omitted). Buss America concedes, for the purpose of resolving its summary judgment motion, that Wolf can establish his prima facie case.

The establishment of a prima facie case creates a rebuttable presumption of discrimination. *Weihaupt v. American Medical Ass'n*, 874 F.2d 419, 426 (7th Cir. 1989) (citations omitted). The burden of *production*[1] then shifts to the employer to articulate a legitimate and non-discriminatory reason for the employee's termination. *Id.* If the employer is able to dissolve the presumption of discrimination in this fashion, the burden shifts back to the employee to show, by a preponderance of the evidence, that the proffered reasons are pretextual. *Sarsha*, 3 F.3d at 1039 (citation omitted). Pretext means more than a mistake on the part of the employer; pretext "means a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). There are two methods of showing pretext: "Pretext may be established directly with evidence that [the employer] was more likely than not motivated by a discriminatory reason, or indirectly by evidence that the employer's explanation is not credible." *Sarsha*, 3 F.3d at 1039 (citations omitted).

Wolf has not introduced any direct evidence of pretext. We must therefore determine whether Wolf has, viewing the evidence in the light most favorable to him, succeeded in showing that Buss America's proffered reasons are not credible. This showing may be made by introducing evidence that demonstrates that (1) the proffered reasons are factually baseless; (2) the proffered reasons were not the actual motivation for the discharge; or (3) the proffered reasons were insufficient to motivate

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[1] The burden of proof, however, always remains with the employee.

the discharge. *Weihaupt*, 874 F.2d at 428 (citations omitted).

It is not sufficient, however, for the employee to show that the employer acted incorrectly or undesirably by firing him; the employee must show that the employer did not honestly believe in the reasons it gave for firing him. *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992) (citations omitted). In an ADEA case, we "do[ ] not sit as a super-personnel department that reexamines an entity's business decisions. The question is not whether the [employer] exercised prudent business judgment, but whether [the employee] has come forward to refute the articulated, legitimate reasons for his discharge." *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986) (internal citations omitted), *cert. denied*, 479 U.S. 1066 (1987).

In this case, Buss America proffered six primary reasons in its motion for summary judgment to justify its decision to terminate Wolf, instead of either of the two other service engineers: (1) Wolf had trouble with the way things were done at Buss America and made complaints to the parent company; (2) Wolf was dilatory in obtaining a home telephone; (3) Wolf failed to write his service reports in a timely fashion; (4) Wolf behaved arrogantly towards customers; (5) Wolf failed to call Buss America often enough while he was out on service calls; and (6) Wolf was excessively talkative. On their face, these reasons are legitimate and non-discriminatory and thus sufficient to dissolve the presumption of discrimination.

Therefore, Wolf must raise an issue of fact regarding each of the reasons proffered for his dismissal or suffer the affirmance of the district court's grant of summary judgment. *See Russell*, 51 F.3d at 69 ("The fact that some of [the employer's proffered] reasons were successfully called into question by [the employee's] deposition or affidavit does not defeat summary judgment if at least one reason for [the adverse employment action] stands unquestioned."). Wolf may still prevail, however, even if he does fail to cast doubt upon all of the proffered reasons: "There may be cases in which the multiple grounds offered by the defendant for the adverse action of which the plaintiff complains are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment." *Id.* at 70.

After reviewing the record, we conclude that Wolf has raised material issues of fact regarding several of Buss America's proffered reasons. We further conclude, however, that these doubtful reasons are neither "so intertwined," nor "so fishy and suspicious" as to call the remaining reasons into doubt. *Id.* Accordingly, we find that Wolf has failed to carry his burden.

A. Credible Reasons for Wolf's Dismissal

1. Wolf's Complaints to Buss AG

Buss America first contends that its decision to terminate Wolf was partially justified in light of Wolf's dissatisfaction with the conditions at Buss America and Wolf's ensuing complaints to Buss America's parent company, Buss AG. More particularly, Buss America averred that

Wolf reported directly to certain individuals at Buss AG and made unfavorable comparisons between Buss America and Buss AG's respective operations. Wolf admits that he contacted Buss AG on at least two occasions, but he asserts that his criticisms were constructive, and that both contacts resulted in favorable changes at Buss America.

By claiming that his suggested changes were ultimately beneficial, however, Wolf misses the point. Buss America does not claim that it was particularly troubled by the *content* of Wolf's communications to Buss AG. Rather, Buss America alleges that it was the *occurrence* of these communications which it found troubling. The fact that Wolf conducted these communications indicated, in Buss America's view, that Wolf had failed to adequately sever his ties with Buss AG – this situation, in turn, allegedly hindered Wolf's ability to adapt to the new environment of Buss America.

Wolf further adds that he was not criticized at the time he made his suggestions – approximately nineteen months before his dismissal. Buss America does not argue, however, that Wolf's actions were so opprobrious as to call for his immediate dismissal. Rather, Buss America asserts that it was only after an economic downturn – a development which Wolf does not dispute – forced it to fire one of its three service engineers that it dismissed Wolf as the least desirable of the three. Therefore, we conclude that Wolf has failed to raise an issue of material fact regarding this reason.

2. Wolf's Failure to Write Timely Service Reports

Buss America also asserts that Wolf failed to complete his required service reports in a timely fashion. Wolf wholly denies this allegation, claiming that he completed his service reports on a daily basis. The district court, however, found that Wolf had failed to show pretext on the issue of the propriety of his service reports in light of Wolf's admitted practice of completing his reports in German instead of in English. In making this finding, however, the district court went beyond the face of Buss America's motion for summary judgment and Local Rule 12(m) statement of material facts, and looked to the deposition testimony of Frank Rauch, Buss America's service manager. In his deposition, Rauch testified that Wolf's German-language reports were largely useless to Buss America and that he had asked Wolf many times to write his reports in English. Wolf argues that the district court erred by looking beyond the parties' pleadings to the record of the case in this fashion.

As Buss America correctly argues, however, Rule 56(c) of the Federal Rules of Civil Procedure does not limit a district court's consideration of a summary judgment motion to the content of the parties' pleadings. Rather, Rule 56(c) directs the court to examine "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *See also Board of Nat'l Missions of Presbyterian Church in the United States v. Smith*, 182 F.2d 362, 364-65 (7th Cir. 1950) ("The fact that the [summary] judgment was granted on a reason different from that assigned by the defendant is immaterial, where, as here, the motion was properly

granted on the undisputed facts shown and on an issue presented by plaintiff's complaint."); *Wilder v. Prokop*, 846 F.2d 613, 626 (10th Cir. 1988).[2]

Rauch's deposition, which the district court was privileged to consider, indicates that Wolf's practice of writing his reports in German was viewed as problematical by Buss America, and that this concern was communicated to Wolf. Wolf has admitted to writing his reports in German, at least initially. It seems clear to us that the

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[2] The dissent disagrees with this summation of the law and cites in support *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), and *Hartman v. Board of Trustees of Community College Dist. No. 508*, 4 F.3d 465 (7th Cir. 1993). In *Malhotra*, we reviewed the dismissal of a suit for ethnic discrimination. The district court had granted the defendant's motion for summary judgment after concluding that the plaintiff had failed to establish a threshold showing of discrimination. We reversed, however, because the defendant's motion had solely addressed the purely legal ground that the claim was time-barred. As we stated: "[I]t was not Malhotra's burden to produce evidence concerning claims as to which [the defendant's] sole ground for summary judgment was the statute of limitations." *Malhotra*, 885 F.2d at 1310. In *Hartman*, we likewise criticized the district court's decision to dismiss a claim on the merits where the defendants' motion for summary judgment had contested the claim from a purely legal standpoint: "Because defendants' arguments did not attack the factual predicate of Hartman's claim, she was under no obligation to improve on it by adducing more specific facts, and the claim should not have been dismissed for her failure to do so." *Hartman*, 4 F.3d at 469.

These cases are to be distinguished from the present matter. Here, Buss America's motion for summary judgment squarely addresses the merits of Wolf's claim. Faced with such a motion, a district court is privileged to consider any additional evidentiary material contained in the record which bears on the claim.

completion of Wolf's reports in an unacceptable language would adversely impact the "timeliness" of those reports as they would not be immediately comprehensible to most of Buss America's other employees. Consequently, we conclude that Wolf has failed to show pretext on this issue.

B. Reasons for Wolf's Dismissal Which are Not Credible

Wolf has not, however, utterly failed in his endeavor to raise issues of material fact regarding Buss America's reasons for his dismissal. We find that Wolf has succeeded in calling the remaining four reasons proffered by Buss America into doubt.

1. Wolf's Dilatoriness in Obtaining a Home Telephone

Buss America argues that its decision to terminate Wolf was driven, in part, by Wolf's failure to obtain a telephone at home when he was told to do so. Wolf admits that he was told to obtain a home telephone on at least two or three occasions, and that it nonetheless took him approximately five or six months, after he was hired, to do so. Wolf justifies his delay by claiming that, before he obtained a home telephone, Buss America never contacted him on those occasions when he did have access to a phone – e.g., when he stayed at a hotel – and that Buss America never contacted him at home after he obtained a phone. Wolf claims, moreover, that he had concluded, in light of the frequency with which he was away from home and the allegedly casual manner in which Buss

America made its repeated requests, that his having a home telephone was not important to Buss America.

Buss America, in turn, argues that it did regard a home telephone as important. Rauch testified in his deposition that Wolf's lack of a phone forced him to travel to Wolf's home on several occasions in order to communicate with Wolf.

As we have previously noted in a similar situation, "[w]e cannot resolve the conflict between these two positions without deciding which side to believe. On summary judgment, a court can neither make a credibility determination nor choose between competing inferences. Rather, these are functions for a jury." *Sarsha*, 3 F.3d at 1041 (internal citations omitted). Thus, we conclude that there does exist a genuine question regarding whether the failure to promptly obtain a home telephone was sufficient, in part, to motivate Wolf's discharge.

2. *Wolf's Arrogance to Customers*

Buss America additionally contends that Wolf exhibited an "arrogant" attitude about Buss America's products and himself to its customers. In his Local Rule 12(n) response, Wolf generally denied that he was ever arrogant to customers about anything. The district court, however, found that Wolf had failed to raise a question of material fact on this issue because he failed to deny Rauch's contention, contained in his deposition, that Wolf had acted arrogantly by leaving a worksite on one or more occasions when a customer's representative failed to promptly meet with him. In effect, the district court

applied *sub silentio* its Local Rule 12(n)[3] and concluded that Wolf had admitted to leaving worksites by failing to specifically deny this charge.

Although we have upheld the strict application of Local Rule 12(n), *see Schulz v. Serfilco, Ltd.*, 965 F.2d 516, 519 (7th Cir. 1992), we conclude that the district court has erroneously applied it in this instance. Under the operation of Local Rule 12(n), the party opposing summary judgment is deemed to have admitted, through failure to controvert, only those facts set forth in the moving party's Rule 12(m) statement. Here, Buss America's Rule 12(m) statement avers only generally that Wolf exhibited arrogance towards customers; the specific contention that Wolf arrogantly left worksites is contained in Rauch's deposition. Thus, Wolf's general denial is all that is needed to raise a question of material fact on this issue.[4]

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[3] Local Rule 12(n) provides, in pertinent part: "All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party."

[4] This situation is to be distinguished from the one involving Wolf's failure to write timely service reports, discussed *supra*. It is true that there we upheld the district court's decision to look to the record as a whole in order to reach the conclusion that writing reports in German was an admission of untimeliness. However, that instance involved an express admission by Wolf in his deposition that he had written his reports in German, at least initially. If Wolf had also admitted in his deposition to leaving worksites when not promptly met by customers, then the district court would also have been privileged to consider this fact. Wolf did not, however, make any such express admission and, since Buss America's Rule 12(m) statement does not raise this specific issue, Wolf's failure to controvert it in his Rule 12(n) response cannot serve as an admission.

3. Wolf's Failure to Phone-in When on Service Calls

Buss America further argues that Wolf failed, despite frequent requests, to regularly phone the office while he was out on service calls. Buss America acknowledges that Wolf occasionally phoned, particularly when he needed to order parts, but it claims that Wolf repeatedly ignored the company's request to phone on a regular basis – whether or not a problem was encountered. Wolf disagrees and claims in his Rule 12(n) response that he "always" called the office after completing an out-of-town assignment unless he happened to finish his assignment after Buss America's office had closed, in which case he would call the next day.

The district court, however, declined to credit Wolf's denial after it found that it was contradicted by Wolf's deposition testimony. When asked whether Rauch had ever raised the issue of phoning-in while on service calls, Wolf responded:

> We had once a friendly chat, and then he said "you have to learn to use the telephone." I laughed and said, "why," and then he said to me, "Henry, sometimes we will be glad if you would phone us what's going on."
>
> And then I returned him. I remember that one. I returned him, "look, Frank, you sitting in your office five, ten centimeters in front of your phone. I'm in the workshop, black, greasy, oily, why can you not phone me, please."

In his brief before this court, Wolf claims that this testimony related only to one specific instance and that it does not contradict his Rule 12(n) statement.

Viewing this testimony in the light most favorable to Wolf, as we must, we agree. The testimony quoted above is simply too vague for us to arrive at any definite conclusion as to its meaning. It may well be referring to a single instance in which Wolf failed to call because he did not finish his assignment until after Buss America's office had closed for the day. Accordingly, we find that Wolf has also raised a question of material fact on this issue.

4. Wolf's Excessive Talkativeness

Buss America last alleges that Wolf's presence at the office was overly disruptive due to Wolf's proclivity for storytelling. Wolf responds by stating that he was away from the office for the majority of the time and that, in any event, he was no more conversational than anyone else at the office. In support of their respective positions, the parties offer nothing more than the strength of their word. As is the case regarding the importance of promptly obtaining a home telephone, we cannot resolve this conflict without making a credibility determination. *Sarsha*, 3 F.3d at 1041.

IV. CONCLUSION

Wolf has successfully demonstrated that genuine issues of material fact exist regarding four of the six reasons proffered by Buss America for his dismissal. We conclude, however, that Wolf has ultimately failed to carry his burden of showing pretext because the four reasons which he has successfully called into question are neither "so intertwined," nor "so fishy" as to call the

remaining two reasons into doubt. *Russell*, 51 F.3d at 70. We recognize that Buss America has not contended that the two remaining reasons would be sufficient, standing alone, to justify Wolf's dismissal. Indeed, Buss America was aware of the two reasons it now cites for well over a year before Wolf's termination. These two reasons only became sufficient after Buss America was hit by an economic slowdown that necessitated the firing of one of its three service engineers. Thus, the "intertwining" at work here takes place not among the six reasons *per se*, but rather among these reasons and the economic slowdown.

It is true that Buss America chose to fire Wolf instead of Bracikowski, the youngest service engineer. Wolf, however, has not produced any evidence that Bracikowski engaged in the same behavior as was proffered for Wolf's dismissal, nor has Wolf challenged those attributes of Bracikowski's which Buss America labeled as positive – namely, his enthusiasm, eagerness, and basic mechanical skills. Furthermore, we feel that it is not insignificant that Wolf was initially hired by Buss America at the age of 50 – fully ten years into the protected age group. This fact, although not conclusive, is somewhat indicative of Buss America's lack of discriminatory intent.

The picture that emerges here is of an employee who was, overall, competent and diligent. Unfortunately, Wolf also possessed – in Buss America's view – a few, minor flaws. These flaws were not serious enough to call for Wolf's immediate dismissal, but when Buss America was faced with an undisputed economic slowdown these flaws naturally figured into Buss America's decision regarding which service engineer to let go. The facts which accompany age discrimination cases are never

heartwarming. The ADEA, however, is not a form of job insurance for older employees. "The market, like the jungle to which it is sometimes compared, is pitiless. Nothing in the age discrimination law provides tenure to competent older workers. They can be let go for any reason or no reason, provided only that the reason is not their age." *Partington v. Broyhill Furniture Indus., Inc.*, 999 F.2d 269, 271 (7th Cir. 1993).

For the reasons set forth above, the decision of the district court to grant Buss America's motion for summary judgment is affirmed.

AFFIRMED.

ROVNER, *Circuit Judge*, dissenting. In *Russell v. Acme-Evans Co.*, 51 F.3d 64 (7th Cir. 1995), this court considered a discrimination claim to which the employer had offered a number of seemingly independent, non-discriminatory explanations. Despite the plaintiff's success in rebutting some of the company's reasons, we upheld summary judgment because the surviving reason – that the employer was generally dissatisfied with the plaintiff's job performance – had not been rebutted. *Id.* at 69. I joined Chief Judge Posner's opinion in that case because it was clear to me that the employer's general dissatisfaction with Russell's job performance had motivated its actions, and because the opinion recognized that future plaintiffs may survive summary judgment by rebutting some but not all of the proffered reasons for an adverse employment action. As *Russell* explained, "[t]here may be cases in which the multiple grounds offered by the defendant for the adverse action . . . are so intertwined, or the

pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment." *Id.* at 70. The majority today purports to apply *Russell* in affirming a summary judgment in spite of its finding that the plaintiff rebutted four of the six proffered reasons for his termination. The majority finds *Russell's* caveat inapplicable here because it views the four rebutted reasons as "neither 'so intertwined,' nor 'so fishy' as to call the remaining two reasons into doubt." (*Ante* at 13.) I disagree and therefore dissent.

Assuming for the moment that the majority is correct, and that only four of the six proffered reasons have been successfully rebutted, I cannot agree that no one of the four is "so fishy and suspicious" as to call the remaining two reasons into doubt. Consider, for example, Buss America's contention that Wolf had been dilatory in obtaining a home telephone. According to its summary judgment motion, Buss America was troubled by the fact that Wolf had no home telephone during his first six months on the job because this made it difficult for the company to contact him. The motion and accompanying factual statement, however, did not advert to a single instance in which Buss America actually needed or attempted to reach Wolf at home during this period. *See Collier v. Budd Co.*, 66 F.3d 886, 893 (7th Cir. 1995) (reversing summary judgment where company offered little or no evidence to support its proffered reasons). Wolf explained in response that he had purchased a home in Elk Grove Village, Illinois, in September 1989, upon becoming a Buss America employee, but that he had continued to travel on business approximately ninety percent of the time. Thus, he generally communicated

with company officials from either his hotel or his job site. Wolf also indicated that he ordered telephone service for his Elk Grove Village home in February or March of the following year. In the ensuing months and through the date of his termination *almost two years later,* Wolf never once received a telephone call from his employer at his home. Nor did he receive such a call at a hotel in the course of his travels. Thus, construing the record in the light most favorable to Wolf, as we must on summary judgment, the following picture emerges: Buss America terminated perhaps its best engineer in December 1991, in part because he had not had a home telephone almost two years earlier, upon first moving to this country, although he traveled approximately ninety percent of that time and the company never once called him at home or on the road in the ensuing months. In my view, Wolf not only discredited this reason, he exposed it as preposterous. A reasonable jury certainly could infer from the flimsiness of this reason that the company's two remaining reasons also lack credibility. *See Russell,* 51 F.3d at 70.

But the preposterousness of the telephone reason is not even the most persuasive factor favoring Wolf at this stage. *Russell* emphasized that summary judgment may also be improper where the rebutted and unrebutted reasons are "intertwined" – that is, where the reasons themselves are factually related or are considered by the employer only as component parts of its overall decision. 51 F.3d at 70. Here, Buss America concedes that it was the cumulative force of the reasons offered, and not any one standing alone, that caused it to dismiss Wolf and to retain a younger, less experienced engineer. (*See* Buss America Br. at 5-6 (describing the weighing process

engaged in by Rauch).) In that sense, this case bears little resemblance to *Russell*, where the employer expressed a general dissatisfaction with the plaintiff's job performance (evidenced by numerous disciplinary warnings) and then offered more specific concerns as further support for its decision. *See* 51 F.3d at 68-69. The fact that Russell succeeded in rebutting one of the specific concerns did not in that case affect the defendant's overall assessment of the adequacy of his performance. *Id.* Here, however, Buss America was not generally dissatisfied with Wolf's performance. As the majority points out, the company only decided to dismiss one of its three service engineers because of an economic slowdown. In determining which of the three to dismiss, Buss America weighed the relative strengths and weaknesses of each and concluded that the six "negatives" it attributed to Wolf outweighed both his positive qualities and the deficiencies of his younger counterpart. If Wolf had had only two "negatives," however, the company's weighing process may well have produced a different result (assuming, that is, that the age of the candidates was never placed on the scale). Thus, because of the way Buss America characterized its own decision-making process, none of the six reasons can stand alone or even in pairs; those reasons are "intertwined" in any sense of the word.[1]

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[1] The majority offers the following response:

> We recognize that Buss America has not contended that the two remaining reasons would be sufficient, standing alone, to justify Wolf's dismissal. . . . These two reasons only became sufficient after Buss America was hit by an economic slowdown that

Whether or not the proffered reasons are "intertwined," however, is simply a convenient means of approaching the ultimate question in cases such as this one – whether it would be permissible for the finder of fact to infer from the falsity of the rebutted reasons that the remaining reasons also are pretextual. Because we will not affirm summary judgment in an employment discrimination case unless the employer would be entitled to a directed verdict if the record at trial were identical to that compiled on summary judgment (*Russell*, 51 F.3d at 70; *Robinson v. PPG Indus., Inc.*, 23 F.3d 1159, 1162 (7th Cir. 1994)), the majority necessarily holds that a jury, upon finding four of Buss America's proffered reasons to be factually baseless, could not rationally infer that the remaining reasons also are not credible. It is clear, however, that such an inference can be drawn, and has been drawn in other cases. *See, e.g., Fuentes v. Perskie*, 32 F.3d 759, 764 n. 7 (3d Cir. 1994) (inference is permissible); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 734 n. 32 (3d Cir. 1988) (same); *Logue v. International Rehabilitation Assoc.*,

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> necessitated the firing of one of its service engineers. Thus, the "intertwining" at work here takes place not among the six reasons *per se*, but rather among these reasons and the economic slowdown.

(*Ante* at 13.) The point the majority misses is that Buss America never in fact considered any two reasons sufficient, not even in connection with the downsizing required by the economic slowdown. In weighing the positives and negatives of each service engineer, the company purports to have chosen Wolf based on its assessment of six negative characteristics. Clearly, those six negatives are but component parts of Buss America's overall employment decision. They are thus "intertwined" under *Russell*.

Inc., 683 F. Supp. 518, 518 (W.D.Pa.1988) (in considering multiple reasons for a single employment action that are offered through the same witnesses, court may "follow the ancient legal maxim *falsus in uno, falsus in omnibus* "), *aff'd mem.*, 866 F.2d 1410 (3d Cir. 1988); *see also Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602-03 (9th Cir. 1993) (Fernandez, J., concurring) ("As I see it, we do not mean to say that the falsity of one reason cannot affect the court's perception of the truth of another one. . . . If based on the evidence, including the comparison of qualifications, the falsity of one reason, and the weakness of the other, the district court is led to a determination that the other reason is also false, the district court need only say so."); *Sims v. Cleland*, 813 F.2d 790, 793 (6th Cir. 1987) (rejecting argument that inference is mandated but suggesting, *sub silentio*, that inference is permissible). As Judge Becker explained for the Third Circuit in *Fuentes*:

> If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder. That is because the factfinder's rejection of some of the proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available.

32 F.3d at 764 n. 7. That, moreover, is the clear implication of *Russell's* caveat. *See* 51 F.3d at 70.

The majority fails to explain why such an inference would be irrational here. Because all six reasons for Wolf's discharge were offered through the same witness,

a jury could rationally reject his testimony in toto upon finding that more than half of it was fabricated. *See Fuentes*, 32 F.3d at 764 n. 7; *Roebuck*, 852 F.2d at 734 n. 32; *Logue*, 683 F. Supp. at 518. The majority's contrary conclusion suggests to me that the two remaining reasons must be rock solid – like the employer's well-documented dissatisfaction with the plaintiff's performance in *Russell*, for example. Let me consider in more detail, then, the nature of those two allegedly unrebutted reasons.

First is the fact that Wolf had on two occasions suggested to officials at the Swiss parent company that Buss America adopt certain methods successfully employed by the parent. Wolf indicates that he turned out to be right both times and that no one at Buss America exhibited any resentment. Indeed, he produced evidence that Buss America's concerns had been resolved to everyone's satisfaction almost eighteen months before his termination. (*See* R. 30, Ex. 5.) The majority emphasizes, however, that it was the *occurrence* of these communications, and not their content, that was most troubling to Buss America, and that the company had a right to terminate Wolf for this reason. (*Ante* at 6-7.) I have no objection to the majority's analysis of this point, for even a seemingly inane view could be honestly held by an employer, and I agree that it is not our province in an age discrimination case to review the wisdom of a company's actions. (*See ante* at 5.) Indeed, if this had been the *only* reason Buss America had offered, it is unlikely that I would be dissenting today. But it was *not* the only reason, and it certainly does not strike me as so compelling that a jury could not reject it as incredible after finding that the

company also proffered at least four fraudulent reasons. *See Odima*, 991 F.2d at 603 (Fernandez, J., concurring).

Which brings me to the final unrebutted reason, a reason that I do not find unrebutted at all. The majority concludes that Wolf failed to adequately dispute Buss America's contention that he did not complete service reports in a timely fashion. (*Ante* at 7-9.)[2] Yet Wolf indicated in his response that he completed his reports on a daily basis and that no one ever complained about their timeliness. The majority emphasizes, however, that Wolf sometimes completed his reports in German and that Buss America apparently wanted the reports in English. My colleagues infer from this that the reports in fact were untimely, despite Wolf's insistence that they were not. (*See ante* at 9 & 11 n. 4.)

I have several concerns about the majority's analysis of this point. First, Buss America itself, in moving for summary judgment, never linked the timeliness of Wolf's reports to the fact that they were sometimes completed in German. The company admits as much in its brief, conceding that this fact was never asserted in its motion as a

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[2] The precise reason was articulated in Buss America's Local Rule 12(m) statement:

> Rauch wanted [s]ervice engineers to make reports after each service call. Rauch had trouble getting Wolf to submit these reports on a timely basis. In an effort to improve the timeliness of the reports, [Buss America] got each of the service engineers dictaphones so that they could dictate the reports. Even after doing this, Rauch found that Wolf's service reports were unacceptably late.

(R. 22, at 5 (citations omitted).)

basis for the termination decision. (*See* Buss America Br. at 11 & n. 1.) That motion and accompanying factual statement addressed only the timeliness of Wolf's reports (*see supra*, at n. 2), a question on which there undoubtedly is a disputed issue of material fact. It is not our business on summary judgment to search the record for other non-discriminatory reasons that potentially could support a challenged employment decision when those reasons were not actually articulated by the employer itself. *See Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) ("When a party moves for summary judgment on ground A, his opponent is not required to respond to ground B – a ground the movant might have presented but did not."); *see also Hartman v. Board of Trustees of Community College Dist. No. 508*, 4 F.3d 465, 469 (7th Cir. 1993). That strikes me as something entirely different from granting summary judgment on some *legal ground* supported by the record but not raised in the motion. (*See ante* at 8.)

I also think it improper on summary judgment to infer that Wolf's reports were consistently late simply because they sometimes were completed in German. (*Cf. ante* at 9.) As I mentioned, Buss America in its motion never linked the timeliness of the service reports to the language in which they were written. (*See* R. 22, at 5.) More importantly, Rauch also never made such an assertion in his deposition. He merely indicated that the company had asked Wolf to write his reports in English and never suggested that it considered a report untimely when completed in some other language. (R. 22, Ex. F, at 126.) Construing the record in Wolf's favor, then, we must conclude that the two were not linked. On the question of timeliness, the sole reason advanced by the company in

its motion, Rauch maintained that it sometimes took Wolf a full year to complete his service reports. (*Id.*) The summary judgment motion insisted, moreover, that Wolf's reports remained unacceptably late even after Buss America provided him with a dictaphone, which allowed him to dictate the reports in English. (R. 22, at 5.) Those assertions are contradicted in Wolf's response. Whether Wolf in fact completed his reports on a daily or a yearly basis can only be resolved after a trial. My colleagues, however, have short-circuited that process by relying on a reason never asserted in Buss America's motion, and by drawing an inference from that reason which is adverse to the nonmovant. Only in this way can the majority conclude that four, rather than five, of the "intertwined" reasons were successfully rebutted.

The majority also fails to consider that Wolf was by far the company's most highly skilled engineer. Whereas Wolf had worked with the relevant equipment for approximately thirty years, the younger engineer retained by the company had been hired only one year earlier. The retained engineer also learned most of what he knew about Buss America's equipment from Wolf, who had trained him. Buss America itself apparently considered Wolf to be an exceptional engineer, as the company had attempted to lure him away from its Swiss parent for almost a decade. That a company chooses to terminate an engineer with superior skills while retaining a younger, less experienced engineer certainly is relevant to any consideration of whether the employer's proffered reasons are credible and whether they in fact prompted the adverse employment action. *See, e.g., Collier*, 66 F.3d at 893; *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990)

(reversing summary judgment where age discrimination plaintiff showed his alleged deficiencies to be exaggerated and offset by his overall performance).

The majority acknowledges early on that summary judgment motions must be considered with "added rigor" in employment discrimination cases such as this one. *Ante* at 3; *see also Collier*, 66 F.3d at 892; *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994). Despite that, it is content to affirm summary judgment here on the slimmest of records. That record reveals that Buss America purports to have terminated perhaps its best service engineer for six reasons, four of which Wolf rebutted and two that he allegedly did not. One of the surviving reasons, however, was never actually advanced by the employer, and the other is less than compelling. Such a case, in my view, is simply not summary judgment material. In that regard, I think it important to note that this is *not* a case about whether the federal age discrimination law provides a form of tenure or job insurance for competent older workers in an increasingly "pitiless" market. (*See ante* at 14.) No one disputes that it does not. This is instead a case about the standard of proof to which we will hold discrimination plaintiffs like Henry Wolf when their employers, on summary judgment, assert that a myriad of non-discriminatory reasons contributed to a single adverse employment action. That strikes me as a very important question in the development of this circuit's discrimination law. Because today's decision

provides a less than satisfactory answer, I most respectfully but vigorously dissent.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY WOLF, Plaintiff, v. BUSS (AMERICA) INC., Defendant.	)	No. 94 C 902 Judge Suzanne B. Conlon

MEMORANDUM OPINION AND ORDER

Henry Wolf sues Buss (America) Inc. ("BAI"). Count I of the complaint alleges that BAI discharged Wolf on the basis of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Counts II and III are claims for promissory estoppel and breach of contract arising under Illinois law. BAI moves for summary judgment pursuant to Fed. R. Civ. P. 56.

BACKGROUND

The following facts are undisputed. BAI is a Delaware corporation headquartered in Illinois. Pl. Rule 12(M) stmt., ¶ 1; Def. Rule 12(N) resp., ¶ 1. BAI is wholly owned by Buss AG Basel ("Buss AG"), a Swiss company.[1] Rule 12(M) stmt, ¶ 5; Rule 12(N) resp., ¶ 5. BAI sells and services equipment manufactured by Buss AG and its affiliates. *Id.*

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[1] Buss AG was originally named as a defendant in this action. On December 8, 1994 the court dismissed all claims against Buss AG without prejudice.

Wolf was hired by Buss AG in 1961 as a service engineer. Deposition of Henry Wolf ("Wolf Dep.") at 17. In the early 1970's, Wolf was promoted to chief service engineer. *Id.* at 19-20. Wolf's job involved travelling throughout the world to service and install machines manufactured by Buss AG. *Id.* at 24-25. Wolf occasionally performed work in the United States while employed by Buss AG. Wolf Dep. at 55. Wolf made one trip to the United States in 1971, and several more during the 1980's. *Id.* at 56-57.

In December 1988 and January 1989, Wolf met with Klaus Schmidt, the president of BAI, and Adrian Kreusi, Wolf's boss at Buss AG, to discuss the possibility of Wolf's full time employment with BAI. Wolf Dep. at 75-79. These discussions resulted in Wolf agreeing to work for BAI. *Id.* at 84. According to Wolf, Kreusi repeatedly promised him a job at BAI until he retired. *Id.* at 76-77, 80, 87. Wolf states that Schmidt was present during one of his discussions with Kreusi and nodded his head after Kreusi promised Wolf a job until retirement. *Id.* at 88; Affidavit of Henry Wolf ("Wolf Aff."), ¶ 4. Wolf claims that Schmidt later told him, "Henry, I'm afraid we have you for the next twelve years." Wolf Dep. at 88-89.

Wolf and Schmidt signed a memorandum of agreement setting forth the terms of Wolf's employment with BAI. Deposition of Klaus Schmidt ("Schmidt Dep."), Ex. 1. The memorandum did not specify the length of Wolf's employment with BAI. *Id.* The memorandum contained the statement "AHV will be paid by [Buss America]." *Id.* AHV is a Swiss form of social security. Rule 12(M) stmt., ¶ 10.

Wolf began working for BAI on September 1, 1989. Schmidt Dep., Ex. 13. Wolf was 50 years old when he began working at BAI. Rule 12(M) stmt., ¶ 10. At the time Wolf was hired, there was one other service engineer at BAI, Klaus Erlewein; Erlewein was 49 years old. *Id.*, ¶ 11. In November 1990, BAI hired a third service engineer, George Bracikowski, aged 33. *Id.*; Rule 12(N) resp., ¶ 11.

Beginning in 1991, BAI began to experience net operating losses. Affidavit of Klaus Schmidt ("Schmidt Aff."), ¶¶ 2-4. Schmidt determined that personnel layoffs were necessary in various departments within the company. Schmidt Aff., ¶¶ 5-6. The service department in which Wolf was employed was among those selected for layoffs. *Id.*, ¶ 8. In November 1991, Schmidt informed Frank Rauch, the service department manager, that Rauch would have to lay off one of the people in his department. Deposition of Frank Rauch ("Rauch Dep.") at 87-89. Rauch decided to cut one of the service engineer positions. Rauch Dep. at 82.

Rauch claims that he considered each engineer's positive and negative characteristics in selecting the engineer to be terminated. Rauch Dep. at 97. Rauch cited Wolf's experience, mechanical knowledge, skill with languages, personability, willingness to travel, and willingness to work on holidays as factors in his favor. *Id.* at 121-123. However, Rauch found that several other characteristics supported Wolf's termination, including:

> (1) Wolf compared BAI negatively to Buss AG and had difficulty adjusting to the way things were done at BAI. *Id.* at 124-125.

(2) Wolf took over a year to install a telephone in his house despite Rauch's insistence that Wolf have a telephone to respond to emergency calls. Rauch had to drive to Wolf's house if Wolf was absent from the office to find out the reason for Wolf's absence. *Id.* at 125-126.

(3) Wolf did not make proper service reports, submitting reports that were either late or in German. *Id.* at 126.

(4) Wolf was arrogant to customers and would leave a worksite if the customer did not respond immediately to a service call. *Id.* at 127.

(5) Wolf failed to communicate his whereabouts when out of the office on service calls. *Id.* at 129-31. Wolf also did not call in to tell the office if he would be late to work or absent. *Id.* at 132-33.

(6) Wolf spent too much time telling stories to others, leading to complaints from other departments and from BAI's customers. *Id.* at 134-35.

As a result of his analysis, Rauch decided to fire Wolf. Rauch Dep. at 97. On December 10, 1991, BAI sent Wolf a letter informing him that economic conditions necessitated his layoff. Rule 12(M) stmt., ¶ 26. Rauch asserts that he did not consider Wolf's age or the ages of the other service engineers in making his decision. Affidavit of Frank Rauch ("Rauch Aff."), ¶¶ 3-4.

Wolf disputes the reasons for his termination. Wolf attests that the service department remained busy throughout his employment. Wolf Aff., ¶ 17. Wolf also disputes the accuracy of Rauch's analysis. In particular:

(1) Wolf admits that he offered suggestions about doing things differently and on two occasions described his prior experience in Switzerland in order to help, but states that he never received any complaints about his behavior. Wolf Aff., ¶ 15.

(2) Wolf attests that Rauch did not stress the importance of having a telephone, mentioning it "2 or 3 times at most." Wolf Aff., ¶ 7. Wolf notes that BAI never attempted to call him at home after he got a telephone. *Id.*, ¶ 8.

(3) Wolf claims that his service reports were done daily. *Id.*, ¶ 10. Wolf admits that he prepared the reports in German, but states that he did so for the convenience of his fellow service engineers and because translating his reports into English was time-consuming. *Id.*

(4) Wolf denies that he was ever arrogant to BAI customers. *Id.*, ¶ 16.

(5) Wolf asserts that it was his practice to call in whenever he completed an out-of-town job. Supplemental Affidavit of Henry Wolf ("Wolf Supp. Aff."), ¶ 1. Wolf attests that when he finished a job too late to call in before BAI closed, he called in the next day. *Id.*, ¶ 2.

(6) Wolf states that he was no more social than other people and that he never heard complaints about talking too much in the office. Wolf Aff., ¶ 13.

DISCUSSION

I. Summary Judgment

The court will grant summary judgment when the moving papers and affidavits show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Unterreiner v. Volkswagen of America*, 8 F.3d 1206, 1209 (7th Cir. 1993). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Stewart v. McGinnis*, 5 F.3d 1031, 1033 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1075 (1994).

In considering a motion for summary judgment, the court views all evidence in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Unterreiner*, 8 F.3d at 1209. However, once the moving party meets its burden of production, the nonmoving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 248; *Stewart*, 5 F.3d at 1033.

II. The ADEA

The ADEA makes it unlawful for an employer to discharge an employee because of the employee's age. 29 U.S.C. § 623(a)(1). The ADEA's protection extends to employees who are at least 40 years old. 29 U.S.C. § 631.

A terminated employee may prove age discrimination in one of two ways. The plaintiff may (1) present

direct or circumstantial evidence that age motivated the employment decision or (2) rely upon the burden-shifting framework originally established for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1122 (7th Cir. 1994). It is undisputed that Wolf provides no direct evidence of age discrimination.

Under the *McDonnell Douglas* framework, an ADEA plaintiff can establish a *prima facie* case of age discrimination by showing (1) that he is in the class protected by the ADEA; (2) that his job performance met his employer's legitimate expectations; (3) that the plaintiff was discharged; and (4) that younger employees not in the protected class were treated more favorably. *Robinson v. PPG Industries*, 23 F.3d 1159, 1162 (7th Cir. 1994). If the plaintiff establishes a *prima facie* case, the burden of production switches to the employer to articulate a non-discriminatory reason for the discharge. *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992). If the defendant articulates a non-discriminatory reason, the burden shifts back to the plaintiff to show that the proffered reason is pretextual. *Oxman v. WLS-TV*, 846 F.2d 448, 453 (7th Cir. 1988). The plaintiff may demonstrate pretext by showing that a discriminatory reason more likely motivated the employer or that the proffered explanation is unworthy of belief. *Id.*

The parties assume, for purposes of argument, that Wolf can establish a *prima facie* case under the *McDonnell Douglas* framework. BAI proffers a non-discriminatory reason for Wolf's termination, asserting (1) that Wolf's layoff was part of a reduction in force motivated by economic necessity and (2) that Wolf was selected for

layoff based upon Rauch's analysis of Wolf's strengths and weaknesses. Wolf does not seriously dispute BAI's contention that he was laid off as part of a company-wide reduction in force motivated by economic necessity. Wolf notes that the service department remained busy throughout his employment at BAI, but admits that he had no knowledge of BAI's revenues or profits. Wolf Aff., ¶ 17. Instead, Wolf contends that BAI's alleged reasons for selecting him for layoff are pretextual.

Rauch claims that he terminated Wolf because Wolf made negative comparisons between BAI and Buss AG and had trouble adjusting to the way things were done at BAI. Rauch Dep. at 124-25. Wolf concedes that he offered suggestions about doing things differently at BAI and on at least two occasions made comparisons with his prior experience at Buss AG. Wolf Aff., ¶ 15. Wolf also attaches a BAI internal memo stating that BAI had talked to Wolf about bypassing BAI and referring customer questions directly to Buss AG. Pl. Ex. 5. Wolf states only that he never received any complaints about his behavior. Wolf Aff., ¶ 15. Wolf's admission that he made comparisons between BAI and Buss AG bars his assertion of pretext. Given the evidence of Wolf's behavior presented by both sides, no reasonable jury could conclude that Rauch's assessment was factually baseless or unworthy of belief.

Rauch also cites Wolf's failure to install a telephone as a reason for his dismissal. Rauch Dep. at 125-126. Wolf does not dispute Rauch's claim that he failed to get a telephone after Rauch asked him to do so "2 or 3 times." Wolf Aff., ¶ 7. Instead, Wolf contends that it was not important for him to have a telephone because BAI did not call him after he had a telephone installed. *Id.*, ¶ 8.

Wolf's assertion that a telephone was unnecessary does not constitute evidence of pretext. Misguided or unfair personnel assessments are not actionable under the ADEA unless age played a role in the evaluation. *Robinson*, 23 F.3d at 1164. Absent some evidence that the employer did not in fact rely upon a given criterion, the ADEA will not interfere with an employment decision "[n]o matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers." *McCoy*, 957 F.2d at 373 (citing *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987)).

Rauch further claims that Wolf failed to properly fill out service forms, completing them late or in German. Rauch Dep. at 126. Wolf contends that his service reports were filed daily; however, Wolf admits that he filled out the forms in German. Wolf Aff., ¶ 10. Wolf contends that it was better for him to fill out the forms in German because Klaus Erlewein, another BAI service engineer, read German more easily and because translating his report into English took more time. *Id.* Again, Wolf's response attacks the wisdom of BAI policy without disputing the factual basis for Rauch's evaluation. Wolf therefore provides no evidence of pretext.

Rauch cites Wolf's arrogance to customers as another reason for his decision, noting that Wolf would leave a worksite if a customer representative did not promptly meet with him. Rauch Dep. at 127. Wolf responds that he was never arrogant to customers. Wolf, ¶ 16. However, Wolf does not deny Rauch's contention that he left work sites if not promptly met by a customer representative.

Wolf's failure to provide any evidence disputing the factual basis for Rauch's claim prevents the court from holding that Rauch's characterization is unworthy of credence or is an insufficient basis for Wolf's dismissal.

Rauch states that Wolf did not call BAI when out on service calls or inform BAI if he would be late or absent. Rauch Dep. at 128-133. Wolf contends that he always called in. Wolf. Supp. Aff., ¶ 1. However, Wolf's claim is undercut by his own deposition testimony. Wolf testified that he responded to Rauch's request that he call in by stating that Rauch should call him at the worksite. Wolf Dep. at 219. A party cannot create an issue of fact by contradicting his own deposition testimony in an affidavit unless he provides a plausible explanation for his change of heart. *Darnell v. Target Stores,* 16 F.3d 174, 176 (7th Cir. 1994); *Richardson v. Bonds,* 860 F.2d 1427, 1433 (7th Cir. 1988). Wolf does not attempt to explain the discrepancy between his affidavit and his deposition testimony. Accordingly, Wolf does not provide evidence of pretext.

Finally, Rauch claims that Wolf spent too much time telling stories to others. Rauch Dep. at 134-135. Wolf asserts that he was no more social than other employees and that he never received any complaints about talking too much. Wolf Aff., ¶ 13. Even reading this evidence in the light most favorable to Wolf, Wolf fails to meet his burden under the *McDonnell-Douglas* framework. Given that any one of the other reasons proffered by Rauch provides a valid excuse for selecting Wolf over another employee, Wolf's wholly subjective claim that he did not talk too much provides no basis for concluding that age played a role in his termination.

Wolf contends that BAI is not entitled to summary judgment even if Rauch's concerns were justified. It is undisputed that Wolf was diligent, experienced, and mechanically knowledgeable. Rauch Dep. at 121-123. Wolf contends that BAI fails to show that these positive attributes were outweighed by his shortcomings. In particular, Wolf notes that BAI produces no evidence comparing Wolf's performance to that of George Bracikowski, a younger service engineer retained by BAI. Wolf asserts that without such evidence, BAI cannot demonstrate that Wolf was not fired because of his age.

Wolf misapprehends BAI's burden under the *McDonnell-Douglas* framework. Once a *prima facie* case is established, BAI must only "articulate" a reason for Wolf's dismissal; BAI need not persuade the court that it was actually motivated by the proffered reasons. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). If BAI articulates a reason for Wolf's dismissal, it becomes Wolf's duty to produce evidence showing that the articulated reason is pretextual. *Id.* at 256. Wolf might demonstrate that his dismissal was pretextual by providing evidence that another employee did not perform his job as well as Wolf did. However, Wolf cites no evidence of Bracikowski's comparative performance from which a reasonable jury could conclude that Wolf's dismissal was pretextual.[2] In the absence of any evidence that

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[2] Wolf notes that he trained Bracikowski as a service engineer after Bracikowski was hired in 1990. Wolf Aff., ¶ 19. However, this fact says nothing about Wolf and Bracikowski's relative performances at the time of the layoff in 1991.

Wolf also cites *Shager v. Upjohn Company*, 913 F.2d 398 (7th Cir. 1990). In *Shager*, the court found that evidence of an

Bracikowski's performance was worse than Wolf's, Wolf fails to produce evidence of pretext. Accordingly, BAI is entitled to summary judgment on Wolf's ADEA claim.

III. Promissory Estoppel

Wolf asserts a promissory estoppel claim against BAI. Wolf claims that Kreusi told him that he would have a job at BAI until he retired and that Schmidt stated "Henry, I'm afraid we have you for the next twelve years." Wolf Dep. at 76-88. Wolf claims that he accepted the BAI position in reliance on Smith and Kreusi's statements.

BAI contends that Wolf's promissory estoppel claim is barred by the Illinois Statute of Frauds. The Statute of Frauds requires a writing for any agreement that is not to be performed within the space of one year. 740 ILCS 80/1. The Statute of Frauds applies to promissory estoppel claims arising from employment disputes. *Evans v. Fluor Distribution Companies,* 799 F.2d 364, 367 (7th Cir. 1986); *Cohn v. Checker Motors Corp.*, 233 Ill. App. 3d 839, 599 N.E.2d 1112, 1117 (1992).

Wolf asserts that the Statute of Frauds does not apply to a promise of permanent employment because the death

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employee's superior performance raised an issue of material fact sufficient to avoid summary judgment on an ADEA claim. However, the plaintiff in *Shager* provided evidence, not only that his own performance was good, but that it was "better than that of the young man who was retained when he was fired." *Shager,* 913 F.2d at 401. Because Wolf provides no evidence comparing his performance to Bracikowski's, *Shager* is inapposite.

or disability of the employee could terminate the employment relationship within one year. *See, e.g., Martin v. Federal Life Ins. Co.,* 109 Ill. App. 3d 596, 440 N.E.2d 998, 1005 (1982). *But see, e.g., Koch v. Illinois Power Co.,* 175 Ill. App. 3d 248, 529 N.E.2d 281, 286 (1988) (contracts for permanent employment contemplate a duration of more than one year and are therefore governed by the Statute of Frauds). However, Wolf does not allege that he was promised permanent employment. Instead, Wolf states that he was promised employment "until retirement" or for "twelve years." A promise of employment "until retirement" is not capable of being performed within one year and therefore falls within the statute of frauds. *Evans,* 799 F.2d at 366; *Lamaster v. Chicago & Northeast Illinois District Council of Carpenters,* 766 F. Supp. 1497, 1508 (N.D. Ill. 1991); *Palmateer v. International Harvester Co.,* 85 Ill. App. 3d 50, 406 N.E.2d 595, 597 (1980), *aff'd in part and rev'd in part on other grounds,* 85 Ill.2d 124, 421 N.E.2d 876 (1981). A promise of employment for "twelve years" certainly cannot be performed within a single year. *See Goldstick v. ICM Realty,* 788 F.2d 456, 464 (7th Cir. 1986) (a promise to work for five years cannot be performed within a year).

It is undisputed that neither Smith nor Kreusi's alleged promises were embodied in a writing. Accordingly, the Illinois Statute of Frauds bars Wolf's promissory estoppel claim.[3]

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[3] Because the Statute of Frauds bars Wolf's promissory estoppel claim, the court need not address defendants' further argument that Wolf fails to establish the definite promise or detrimental reliance needed for a promissory estoppel claim.

IV. Breach of Contract

Wolf claims that BAI breached its employment contract with him by failing to make AHV contributions on his behalf. The memorandum setting forth the terms and conditions of Wolf's employment stated "AHV will be paid by [Buss AG]." Schmidt Dep., Ex. 1. It is uncontested that Buss AG made no AHV contributions for Wolf.

BAI claims that both parties intended Buss AG to make AHV payments only if Wolf opened an AHV account. BAI asserts that Wolf's failure to open an AHV account therefore released Buss AG of any obligation to make AHV contributions. BAI supports its argument by asserting that Buss AG was incapable of opening an AHV account on Wolf's behalf. BAI produces an information package published by the Swiss old-age, survivors, and disability insurance information center ("the OASI information package"). Def. Ex. C. The OASI information package explains how Swiss citizens living abroad can open an AHV account. *Id.*, §§ 3, 8.

The OASI information package does not suggest that an employer may not open an AHV account on behalf of its employees. The information package therefore cannot conclusively establish either (1) that both Wolf and BAI contemplated that Wolf would open the AHV account or (2) that Wolf's enrollment in the AHV program was a condition precedent to the obligation to make AHV contributions. Accordingly, BAI is not entitled to summary judgment on Wolf's breach of contract claim.

CONCLUSION

Defendant's motion for summary judgment is granted in part. Judgment is entered in favor of defendant Buss (America) Inc. and against plaintiff Henry Wolf on Counts I and II of the complaint. The summary judgment motion is denied as to Count III.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

February 7, 1995

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 17, 1996

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. COMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

No. 95-1790	) Appeal from the
HENRY WOLF,	) United States District
Plaintiff-Appellant,	) Court for the Northern
	) District of Illinois,
v.	) Eastern Division.
	) No. 94 C 902
BUSS (AMERICA) INC.,	) Suzanne B. Conlon,
Defendant-Appellee.	) Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant on February 28, 1996, a vote of the active members of the Court was requested,

and a majority[1] of the active members of the Court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

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[1] Judges Flaum, Ripple, Rovner, and Diane P. Wood voted to grant a rehearing *en banc*.

Court, U.S.
FILED
AUG 16 1996
CLERK

No. 96-92

In The

Supreme Court of the United States

October Term, 1995

HENRY WOLF,

Petitioner,

v.

BUSS (AMERICA) INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner's Question Presented misstates the facts that were at issue before the lower courts. In response to Respondent's motion for summary judgment, Petitioner failed to produce evidence that the majority of the reasons offered by Respondent for Petitioner's termination were "untrue." Rather, Petitioner admitted to two of the proffered reasons and denied four of the proffered reasons. Petitioner also disputed the importance of the proffered reasons. While Petitioner raised an issue of material fact as to the four individual proffered reasons that he denied, as a matter of law, his denials were insufficient to taint the two admitted reasons.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR DENYING PETITIONER'S WRIT ... 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Fuentes v. Pirskie, 32 F.3d 759 (3rd Cir. 1994) 6

Louis v. Board of Ed. of City of New York, 705 F.Supp. 751 (E.D.N.Y. 1989) 6

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 3, 6

Odima v. Westin Tucson Hotel Co., 991 F.2d 595 (9th Cir. 1993) 7

Roebuck v. Drexel, 852 F.2d 715 (3rd Cir. 1988) 6

Russell v. Acme-Evans Co., 51 F.3d 64 (7th Cir. 1995) 6

Sims v. Cleland, 813 F.2d 790 (6th Cir. 1987) 7

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 3, 5, 6

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 247 (1981) 3, 6

United States Postal Service Bd. of Governors v. Aiken, 460 U.S. 711 (1983) 5

STATUTES

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. 2

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Buss (America) Inc., respectfully prays that the Court deny a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 16, 1996.

OPINIONS BELOW

Petitioner's statement of the opinions below, and appended to his Petition, is complete and correct.

JURISDICTION

Petitioner's statement of jurisdiction is complete and correct.

STATUTORY PROVISIONS INVOLVED

Petitioner's statement of statutory provisions involved is complete and correct.

STATEMENT

This case involves an employer's business decision to terminate one of its three service engineers; which termination was made as part of an economically dictated

reduction in force. (Petitioner's Appendix at page 2, hereinafter "App.") Petitioner was an at-will employee subject to termination with or without cause, as long as age was not a consideration. Petitioner brought an action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., alleging that he was terminated because of his age.

Petitioner was hired by Respondent when he was age 50 (App. 2) and was terminated by Respondent when he was age 53. (App. 2) The two service engineers retained by Respondent were ages 34 and 51. (App. 2)

Petitioner admits to the necessity and legitimacy of the reduction in force (App. 36), but disputes the reasons offered by the Respondent for selecting him for termination. (App. 36) Petitioner produced no evidence that the reasons asserted by Respondent for his termination were concocted. Instead, Petitioner disputed the reasons by variously denying their significance or denying that he engaged in the alleged behavior.

Petitioner states that his employer found that his performance was "admirable." (Petitioner's Petition at page 2, hereinafter "Pet.") However, this reference is to his performance while employed by Buss AG of Basel, Switzerland, not by the Respondent, Buss (America) Inc., hereinafter sometimes referred to as "employer" and sometimes as "Respondent". (App. 2) Petitioner also refers to the bonus he received prior to his termination for "exceptional contributions to the company." (Pet. 2) However, Petitioner fails to note that everyone in the company received a bonus at that time. His bonus was not based on his individual performance.

Petitioner produced no evidence that his work performance was superior to that of either of the two retained service engineers. (App. 39-40) Neither did Petitioner produce any evidence that the work performance of either of the two service engineers retained by the Respondent were inferior to his. (App. 39-40)

The courts below have held that the employer's two uncontradicted bases for its business decision were sufficient to permit employer to prevail upon its motion for summary judgment and that the Petitioner's denial of four other bases relied upon by the employer, did not taint or render fishy the employer's two remaining independent, non-discriminatory reasons.

Summary Judgment Ruling

While Petitioner disputed four of the employer's reasons by either denying that he engaged in the alleged behavior or disputing the significance of the reasons, Petitioner admitted to two of the reasons. For purposes of a summary judgment motion, only the four challenged reasons were rebutted.

In entering summary judgment in favor of Respondent, the District Court applied the law as set forth in *McDonnell-Douglas, Burdine* and *Hicks. McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 247 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Hicks did not alter the analytical framework developed in *McDonnell-Douglas* and *Burdine*, wherein once the plaintiff establishes a prima facie case, the defendant then

can offer legitimate non-discriminatory reasons for its action. Once the defendant does so, the burden of production shifts back to the plaintiff to produce evidence of pretext. Plaintiff's failure to produce evidence of pretext will permit summary judgment for the defendant.

Ruling on Appeal

The majority panel of the Appeals Court affirmed the District Court's order of summary judgment.

In its opinion, the Appeals Court recognized that the reduction in force required the Respondent to evaluate the performance of its three service engineers and that the several reasons offered by the Respondent for choosing to terminate Petitioner were not fishy nor intertwined. Further, the Appeals Court found the two unchallenged reasons to be independent, non-discriminatory and untainted.

Petitioner's performance history and personality made him, in his employer's judgment, the least desirable of the three service engineers. As an at-will employee, a person in the protected class can be terminated for any reason or no reason, as long as the termination is not based upon his or her age.

In her dissent, Judge Rovner, argues that because (1) four of the six reasons proffered by the employer for its decision to terminate the petitioner were successfully denied for purposes of the motion for summary judgment and (2) another reason, though unchallenged, was "preposterous", the remaining reason, also unchallenged, was

not adequate to sustain the motion for summary judgment.

Judge Rovner argued that finding fault with a twenty-four hour a day, seven day-a-week, on-call service engineer's refusal to install a home telephone was "preposterous."

Judge Rovner was further of the opinion that this case should go to a jury, because Respondent's reasons for choosing to terminate Petitioner were offered by a sole witness: Petitioner's supervisor, notwithstanding the rebuttal was offered by a sole witness as well: the Petitioner.

Petitioner filed a Petition for Rehearing *en banc*, which was denied by a vote of eight to four.

REASONS FOR DENYING PETITIONER'S WRIT

The decision of the Court of Appeals is consistent with this Court's holding in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Petitioner misstates the holding in *Hicks*. *Hicks* did not hold that a trier of fact can infer pretext from the falsity of the proffered reasons. *Hicks* holds that a trier of fact's finding of pretext does not mandate judgment for the plaintiff as a matter of law. *Hicks* states that in order to prevail in a "mixed motive" discrimination case, (1) the plaintiff must show pretext and (2) the trier of fact must be persuaded that actual discrimination occurred. *Hicks*, citing *United States Postal Service Bd. of Governors v. Aiken*, 460 U.S. 711, 716 (1983).

In this case, Petitioner never gets to the situation contemplated in *Hicks*, because Petitioner fails to offer evidence that Respondent's reasons were pretextual. As pointed out, *supra*, *Hicks* does not alter the burden shifting framework of *McDonnell-Douglas* and *Burdine*.

Contrary to Petitioner's assertion, there is no inconsistency among the Circuits as to the issues raised in this case. The Seventh Circuit Court of Appeals permits a plaintiff to show pretext without rebutting each of several reasons proffered by a defendant. In some cases the employer's reasons are so intertwined and so fishy and suspicious, the pretextual character of one can taint the others. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995).

The Seventh Circuit standard for allowing the pretextual character of one reason to taint another appears to be consistent with the decisions of the other Circuit Courts of Appeal cited by Petitioner.

In *Fuentes v. Pirskie*, 32 F.3d 759, 765 (3rd Cir. 1994), the court stated that in some instances some of the proffered reasons may be so weak, implausible or contradictory that a reasonable finder of fact could rationally find all reasons unworthy of credence. In *Roebuck v. Drexel*, 852 F.2d 715 (3rd Cir. 1988), the court found that the plaintiff produced evidence of discrimination in one of the faculty evaluator's opinions, upon which subsequent opinions were based. Thus, a tainting of the other opinions was possible. In *Louis v. Board of Ed. of City of New York*, 705 F.Supp. 751 (E.D.N.Y. 1989), the court held that the employer's reasons could become so riddled with

error that an employer could not honestly have relied upon them.

In two of the cases cited by Petitioner in support of his position, the courts make forceful statements challenging the reasonableness of allowing one pretextual reason to taint another. In *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 600 (9th Cir. 1993), the court stated that the falsity of one reason sheds little light on the truthfulness of the other. The court in *Sims v. Cleland,* 813 F.2d 790, 798 (6th Cir. 1987) noted that the falsity or incorrectness of one reason may not impeach another.

In the case at bar, the Seventh Circuit Court of Appeals determined that the reasons offered by Respondent for Petitioner's termination were neither fishy nor suspicious when coupled with an undisputed economic downturn. Respondent terminated an at-will employee and offered several legitimate non-discriminatory reasons, two of which Petitioner could not challenge. Summary judgment was appropriate under the Seventh Circuit's standard, which is no different than that of the other circuits.

Petitioner's argument is nothing more than Petitioner's "disagreement" with the Respondent's decision. Petitioner ultimately failed to produce any evidence that the Respondent was untruthful in stating its reasons for his termination. If an inference of discrimination can be created by the Petitioner's uncorroborated denials and his disagreement with the wisdom of his employer's decision, then at-will employment will cease to exist and all subjective employment decisions involving older

employees would be subject to a jury trial under the ADEA.

CONCLUSION

The Petition For Writ Of Certiorari should be denied.

August 1996.

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